PAPERS

THE RELATIONS OF POLITICAL SCIENCE TO HISTORY AND TO PRACTICE

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THE LIMITATIONS OF FEDERAL GOVERNMENT

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It requires no little hardihood to appear at this time and place as a critic of the system of federal government.[1] Such an attitude may well seem to indicate ignorance in a professor, incivility in a foreigner and ingratitude in a guest. But I am willing in the interests of scientific investigation to immolate myself upon the altar of my own temerity; I will merely remind you by way of personal apology that my own country like yours is organized upon a federal basis, and that if I have chosen to select the United States as the most conspicuous illustration of the case I wish to establish, it is merely because the advanced stage of federal development attained by this republic renders it the most proper field of investigation for the theorist. In this essay I deal with the operation of federal government in the economic and industrial sphere. It is my purpose to show that this system of government is developing, under modern economic condi-

[1] It goes without saying that in the title of this essay the term federal government is not used in contrast to state government, but as indicating the general system of divided jurisdiction existing in such countries as the United States or Canada, in contradistinction to the unitary governments of the United Kingdom and France.

tions, disadvantages of increasing magnitude and is out of harmony with the general environment of modern industrialism.

Such an opinion stated broadly and without modification appears at variance with conclusions usually accepted and to run counter to the trend of current political speculation. For several generations past federal government has been an object of continuous laudation and its further extension has become one of the commonplaces of political prophecy. An eminent American authority[2] has declared it to be "the only kind of government which according to modern ideas, that is permanently applicable to a whole continent." Even so cautious a theorist as Professor Sidgwick, who hesitates, for instance, to pronounce upon the continuance of constitutional monarchy, is willing to stake his reputation upon the future of federal government. "When we turn our gaze from the past to the future," he writes,[3] "an extension of federalism seems to me the most probable of the political prophecies relative to the form of government."

To the weight of these authorities may be added the conclusions of Dr. Jellinek who declares:—"Ein grosses Reich wird leichter in föderalistischer Form als in der eines wenn auch noch so decentralisirt gestaltenen, Einheitsstaates sich in gedeihlichen weise entfalten können."

It must be admitted also that in the political history of the nineteenth century, the formation of federal governments has played a conspicuous part. The United States, which appeared at first as an isolated and somewhat dubious experiment in political construction, presently became an example for the imitation of other communities. The loosely united cantons of Switzerland were gathered in an actual federal union: the provinces of British North America adopted a government similar in its outline to the organization of the United States: in Germany federation succeeded where any other means of union appeared impossible: in Australia a federal system was created in still closer harmony with the American union than had been the confederation of Canada: and the movement towards a consolidation of the whole British empire upon a federal basis shows how profoundly that system of government has set its mark upon the political evolution of the century which has just elapsed.

But it is necessary while realizing the important part that federal

[2] John Fiske, *American Political Ideas*, 1885, p. 92.

[3] H. Sidgwick, *The Development of European Polity*, 1903, p. 439.

government has played in the making of nations to realize that it, too, like all other human institutions, is far from perfect. It carries with it very decided limitations, serious faults of structure, unheeded perhaps at the time of its inception, but likely to break down under the altering strain of a new environment. Politically and on its external side federal government has proved itself strong: economically and in its internal aspect federal government is proving itself weak.

Let it of course be freely admitted that in most cases federal government has found its origin in the sheer pressure of external necessities. It represents a union for common defense where no other kind of combined action and concerted power would have been possible. It was this aspect of federal government which formed the preoccupation of those who framed and defended the constitution of the United States. The question in 1787 was not as to the choice between federal union and a more complete form of consolidation, but as between federalism and what was practically no union at all. Thus it comes about that the defense of federal government offered by Hamilton, Madison, and Jay has no bearing on the existing situation. Their task was to show the need of union for common defense and in the situation of the hour the future economic weakness of the scheme of union they devised lay entirely beyond their vision. A perusal of the essays of the *Federalist* shows its authors anxious to prove that the powers to be conferred upon the general government were only such as were vitally necessary to its existence: that a central government was not *dangerous*: that there was no fear of its constantly encroaching upon the power of the states. "It will always be far more easy," wrote Hamilton[4] "for the state governments to encroach upon the national authorities than for the national government to encroach upon the state authorities." Madison,[5] writing in the same strain, said: "The state governments will have the advantage of the federal government whether we compare them in respect to their immediate dependence of the one on the other, to the weight of personal influence which each side will possess, to the powers respectively vested in them, to the predilection and probable support of the people, to the disposition and faculty of resisting and frustrating the measures of each other."

It is true that federalism has thus offered a means of harmonizing

[4] *Federalist*, No. 17.
[5] *Federalist*, No. 41.

the differences of communities so divergent in certain respects that complete union was neither possible nor desirable. The huge dominion of the Virginia of 1787 was thus combined with Delaware: under federalism was found in 1867 for the first time a solid basis of union for French and British Canada. And in certain cases and under certain circumstances it may well be conceived that federal union might continue indefinitely as the form of government most suitable to the general environment. This will be the case wherever such natural barriers or actual distance exist between the component parts of the state as to preclude an economic and industrial integration. The union, sometimes proposed, between Canada and the British West Indies, or the union that was long advocated between New Zealand and Australia, could certainly be best accomplished and could best continue on the ground plan of a federal structure. In these cases the partial separation of legislative power only reflects the actual physical separation and the divergent economic life of the two countries. But where a contiguous territory, a homogeneous population and a lack of natural boundaries are found, there a federal form of goverment, however useful it may be as a preliminary bond of union, becomes increasingly a misfit and with the progressive integration of the general industrial life of the community proves itself an obstructive force upon the path of national progress. Especially is this the case under the conditions developed in the last half century, when the progress or transportation and communication have occasioned a general fusion of economic and industrial life over vast areas. The federal relation between, let us say, the New York and the Massachusetts of a hundred years ago rested upon an actual physical and economic separation: the federal separation of Ohio and Indiana, or of the two halves of Dakota today rests upon nothing but a form of constitutional contrivance at variance with the industrial life of the community. It thus appears in the course of industrial evolution that what was at its inception a political expedient of the highest value in the circumstances of the time wears an entirely different aspect in the light of an altered situation. In only one country of the world—the United States of America—has this situation as yet fully developed, and the case of the United States is therefore specially discussed in the present paper. Of the other federal states, some present an economic life still very largely decentralized and disintegrated; others contain in their structure certain modifications of federalism which give them something of the legislative elasticity of a unitary

organization. In Canada, to a great extent, the provinces represent either singly or in contiguous groups, distinct economic units. Ontario and Quebec, separated by natural boundaries and inhabited by people of different races and divergent traditions, fit with perfect harmony into a federal union. There is nothing unnatural or distorted in the fact that their legislative code in regard to labor, religion, and education should be framed upon distinct lines. The maritime provinces are also sharply separated in economic interest and by natural barriers from the rest of Canada and, geographically speaking, form distinct units even among themselves. Between Ontario and the west is a wide stretch of practically uninhabited country. The isolation of British Columbia speaks for itself. It is only on the plains of the west that the federalism of Alberta, Saskatchewan and Manitoba, effected by the adventitious aid of meridians of longitude, wears a suspicious appearance. It is true moreover that the structure of the Canadian constitution contains features of centralization which in many respects almost remove it from the category of federal governments. An analysis also of the Australian Commonwealth would show that the existing six states represent as yet distinct units of population, with physical barriers or uninhabited country interposed, and retain to a considerable extent a distinctive economic life corresponding to the political structure of the Commonwealth. But it is inevitable that in both Australia and Canada a further growth of population and the future integration of commercial and industrial interests will bring about a political misharmony similar to that now existing in the United States. The case of the German Empire stands by itself, for here federalism rests upon a distinctive historic and dynastic basis, and the peculiar operation of the constitution under the dominance of the King of Prussia obviates to a great degree all question as to *ultra vires* legislation.

It is therefore in the United States par excellence that the economic limitations of federal government have appeared and it is to that country that one must turn to study the general problem here presented. The central fact of the situation is that economically and industrially the United States is one country, or at best one country with four or five great subdivisions, while politically it is broken into a division of jurisdictions holding sway to a great extent over its economic life but corresponding to no real division either of race, of history, of units of settlements or of commercial interest. Metternich once said sneeringly of Italy that it was only a geographical expres-

sion. One cannot say even as much as this of such divisions as Utah or South Dakota. At best they are astronomical expressions whose location can only be found by the aid of a solar observation. The true meaning of this comes out when we consider to what a very great extent the progress of transportation, of intercommunication and the expansion of modern business enterprise has unified vast stretches of the United States, has rendered the whole country economically interdependent. The process which has been called the territorial division of labor has been carried forward until producer and consumer in every part of the Union are in close business relation with one and the other, each part of the country being very largely devoted to the raising or manufacturing of products for the use of itself and all the others. How little this economic interdependence harmonizes with the legislative separation into state jurisdictions may be realized by a consideration of the way in which industrial life in the United States has grouped itself upon the principle of the territorial division of labor, regardless of state lines. A few conspicuous illustrations will suffice for the present purpose. In the year 1900, of the $101,000,000 worth of agricultural implements manufactured in the whole country, 41½ per cent came from Illinois: of boots and shoes, out of a total product of $261,000,000, Massachusetts produced 44.9 per cent: the same State is credited with 32.8 per cent of the manufacture of cotton goods: in the making of fur hats four states represented a total of 88½ per cent: in the glass industry two states, Pennsylvania and Indiana, were responsible for 65 per cent of the total product: of the iron and steel manufactures valued at $804,000,000 Pennsylvania produced 54 per cent: Ohio and New Jersey made 65 per cent of the pottery and clay products of the United States: Illinois did 40 per cent of the meat packing: three states produced 48 per cent of the pulp and paper made in the country: four states manufactured 88 per cent of the jewelry: Connecticut alone made 63 per cent of the clocks: California 60 per cent of the wine: Maryland canned 65 per cent of the oysters and New York alone supplied 99 per cent of the collars and cuffs of the United States.

Corresponding to this integration of industry is the progressive unification of control: the transportation system of the country has long since discarded state lines in its organization. The group of companies known as the Vanderbilt system operate some 20,000 miles reaching from New York City to Casper, Wyoming, and covering the

lake states and the area of the upper Mississippi: the Pennsylvania system with 14,000 miles covers a portion of the same territory, centering particularly in Ohio and Indiana: the Morgan system, operating 12,000 miles, covers the Atlantic Seaboard and the interior of the Southern States from New York to New Orleans: the Morgan-Hill system operates 20,000 miles from Chicago and St Louis to the state of Washington: the Harriman system with 19,000 miles runs from Chicago southward to the Gulf and westward to San Francisco, including a Southern route from New Orleans to Los Angeles: the Gould system with 14,000 miles operates chiefly in the center of the middle west extending southward to the Gulf: in addition to these great systems are a group of minor combinations such as the Atchison with 7,500 or the Boston and Maine with 3,300 miles of road.[6]

Analogous to this integration of industry of transportation is the progressive consolidation in the control of capital entirely disconnected, on its economic side, from the boundary lines of the state. This phase of American development is almost too familiar to require even the briefest citation. It has been recently estimated[7] that the seven greatest industrial combinations of the United States represent a capitalization of $2,662,752,000, that below these are 298 organizations representing the consolidation of 3400 original plants: and that the aggregate capitalization outstanding in the hands of the public of 318 important and active industrial trusts in this country is at the present time no less than $7,246,000,000, and covers practically every line of productive industry in the United States.

Alongside of this national consolidation of interest in the control of capital is seen the organization of the forces of labor into vast groups representing the economic solidarity of the whole nation. The enormous membership roll of the Federation of Labor, or of such bodies as the railway brotherhoods, the United Brotherhood of Carpenters or the United Mine Workers of America shows the extent of this process. These associations either disregard state lines in their organizations or make use of them only as a matter of convenience. Their essential aims and collective activities are not associated with the separate states as economic areas.

[6] Statistics based on the Reports of the Interstate Commerce Commission and quoted by Mr. H. T. Newcombe. American Review of Reviews Art. *Recent Great Railway Combinations. 1902.*

[7] Mr. John Moody. Encyclopedia Americana. Art. *Trusts.*

Over against this is to be set the political organization of the country. Here we have the national government and along side of it 46 separate jurisdictions. According to the text of the constitution almost the whole economic field is given over to the latter. To the central government, still according to the text of the constitution, is entrusted only such control as arises out of the commerce cause, the general welfare clause and other familiar portions of Art. I, Sec. 8. The rest of the economic field except in so far as it is diminished by the restrictive operation of the amendment falls under the control of the state governments In the days of Alexander Hamilton this allotment of jurisdiction corresponded with the actual facts of economic life. Today it does not. Yet it is remarkable how imperfectly even the most learned commentators on the constitution of the present time seem to realize the serious distinction between law and fact that thus arises. "The federal powers" writes Professor Stimson, "are political: that is the great criterion. The state powers on the other hand are domestic, social."[8] When it is seen that the sequel of Professor Stimson's discussion shows[9] that his use of the word "social" includes *commercial,* it might almost be thought that under modern conditions such a description of a federal system would contain in itself a serious indictment.

I am quite aware that hitherto I appear to have left out of consideration the very essence of the matter. The question of implied powers and of the expansion by federal control, the powers of judicial interpretation rises at once to one's mind. We have been told since childhood that the constitution of the United State is a document drawn in singularly simple and elastic terms: that the courts, following the leading of the eminent Marshall, have taken advantage of this to effect a progressive increase of federal power by the process of interpretation; that thus there have been "read in" to the constitution new powers to meet the needs of succeeding generations. "The commerce clause," says Mr. Frederick Judson, "written for the days of the stage coach and the sailing vessel has been adapted by judicial construction to an age of steam and electricity."

I readily grant that judicial interpretation has done much: that by its means federal power has been enormously increased; that without

[8] *The Law of the Federal and State Constitutions of the United States* (1908), Chap. x, p. 69.

[9] Op. cit., p. 71.

it the whole system would have terminated long ago in general shipwreck. But that it has really and adequately met the economic needs of the situation or that it ever can do so, is a proposition to which I hesitate to assent.

I maintain on the contrary that federal government, on the model of that of United States, creates something like a legislative chaos in which the conflict of rival authorities and the infinite confusion of jurisdiction removes from state and federal government alike the ability to exercise a proper and adequate control. Laws in reference to labor, capital, commerce and transportation, whether adopted by state or federal legislature, are honeycombed by constitutional limitations, riddled with adverse decisions and in the intricate state of the law are absolutely at the mercy, for weal or for woe, of the judicial authorities. Under these circumstances the impotence of the legislative branch of the government enables the judiciary to invade the sphere of the legislature and to constitute itself a quasi-legislative power, annuling or sustaining legislation, and expanding or contracting the competence of other bodies in the state according to its own opinion of what is best in the public interest. If the judiciary could perform this function in such a way as to actually and effectively set up a national and uniform control of industry and commerce there would be no fault to be found except perhaps by persons infatuated with pure theory or by the purblind advocate of the doctrine of state rights. But this effective, uniform control is precisely what is lacking, nor is there any prospect under the present system of its achievement.

To review the whole economic situation in detail as thus created would demand a vastly more elaborate treatment than is possible within the present compass. But a few typical cases may with profit be examined. A good example is found in the matter of labor laws. The labor code of the United States for instance, in regard to child labor, as a direct result and as a necessary disadvantage of a federal system, is a mere chaos. There is no unity, no uniformity, no common plan. Worse than that there is a standing temptation for any one state to make capital out of the virtue of its neighbors by permitting forms and conditions of employment elsewhere prohibited. Compare for instance the legislation operative in Massachusetts or Ohio with the fact (as stated by a writer in the Annals of the American Academy in 1907) that in South Carolina and in Georgia and in Alabama it is yet possible for a ten year old child by permission of the

law to work 12 hours a day. The same author states that there are 66 mills in North Carolina where 12 year old children may work a twelve hour night by law. Or consider the following statement as an illustration of the operation of federalism in the industrial field: "The glass workers of New Jersey oppose any attempt to prohibit the night work of boys under sixteen on the ground that such work is permitted in the neighboring state of Pennsylvania. Some people in Georgia seem to think that they cannot afford to place any restrictions upon their cotton manufacture because they are just making a good start in competition with new England and the rest of the world in cotton manufacturing and they want to enjoy every advantage they possess." Now it may be argued as against this that a legislative code that might apply to Massachusetts would be entirely out of place in such a state as Georgia; that in such a case the difference of law corresponds to the difference of economic environment. But what are we to say of the states of the Ohio valley forming a single community in the geographical, racial and industrial sense, but having labor laws for mines and factories on a widely divergent basis. "Industrially as well as geographically," declares Mr. J. H. Morgan chief inspector of workshops and factories in the state of Ohio, "we of the Ohio valley are one people and our laws should be uniform, not only that they may be the easier enforced, but in justice to the manufacturers who pursue the same industries in the several states and therefore come into close competition with one another."

Of the situation of the United States in general in regard to labor legislation, Professor Commons of the University of Wisconsin speaks as follows:

"The activities of unions in reducing the daily period of work is all the more important on account of the obstacles in the way of state regulation in the United States. These obstacles are found more *in our form of government* than in our economic conditions. The leading state in this line of protecting employees' welfare is handicapped by the lack of uniformity consequent upon our federal system, while the constitutions of the states and the nation, under the often diverse decisions of the courts, prevent the legislatures from doing what in other countries is solely a matter of legislative discretion."[10]

Or take the question of the control of insurance. Following on the

[10] *The Law of Interstate Commerce, 1908.*

Supreme Court decision in Paul *vs.* Virginia in 1868 there were twenty-five years of agitation in favor of federal supervision and regulation and a number of unsuccessful attempts at legislation. President Roosevelt, in his message of Dec. 8, 1904, said that insurance vitally affects the great mass of the people of the United States and is national, not local, in its application. Meantime what was the actual position of the regulation of insurance under the federal system? The state insurance laws were utterly chaotic and conflicting. "If a compilation of these laws were attempted," wrote Mr. Huebner of the University of Pennsylvania, "a most curious spectacle would result. It would be found that fifty-two states and territories are all acting along independent lines and that each, as has been correctly said, possesses its own schedule of taxations, fees, fines, penalties, obligations and prohibitions and a retaliatory or reciprocal provision enabled it to meet the highest charges any other state may require of companies of other states. · · · · Especially in fire insurance have the evils of state legislation become clearly apparent. Despite the general introduction of a uniform fire policy in the United States, its provisions have given rise to a great diversity of judicial opinion in the several states."

Take again the still more sweeping illustrations offered by industrial corporations and the conditions of their organization and management. Here again the 46 distinct jurisdictions assert themselves in the form of 46 different modes of incorporations and 46 different plans of control or the lack of it, although such an arrangement corresponds to nothing whatever in the real industrial and business life of the community. The subject is so familiar as to need no elaborate quotation in support. "The abuses of the corporate privileges which have sprung up in the gap between federal and state powers," writes Mr. F. E. Horack,[11] "are the result of the deplorable lack of uniformity in the corporation law and procedure in the several states. . . . Adequate regulation through state legislation has proved to be impossible. Worse than all these has arisen the strange spectacle of state governments bidding against one another for the privilege of incorporating a company by the laxity and inefficiency of their laws."

"The bidding of the states for the chartering of corporations," says a recent writer, "has created a body of laws which confer great powers—powers our forefathers never dreamed would be given to

[11] F. E. Horack. *The Organization and Control of Industrial Corporations, 1903.*

any group of individuals—to those who are willing to pay a small corporation fee in exchange for such privileges. So little supervision and control are now exercised by the state governments that corporations are able through the secrecy which surrounds their actions, to override the law and to some extent to be creations subject only to the wishes and desires of the corporate managers."

This last topic brings one at once to the question of combinations and the anti-trust legislation of the state and federal governments. Here again the inevitable result of the divided jurisdiction and constitutional limitation set up by a federal system has been the creation of a bewildering chaos of legislation. As enumerated in the Industrial Commission Report of 1900, anti-trust measures had been adopted by constitutional provisions in 15, and by statute in 27 states. The whole mass of this legislation devoid either of uniformity of structure or of purpose, has been perforated in all directions by hostile decisions of the courts. The Supreme Court decision of March 10, 1902,[12] declaring the Illinois anti-trust law invalid has been held to have shattered half the anti-trust laws of the states.

A final and perhaps convincing illustration of the inherent inefficiency of a federal system of government in the economic field is found in the matter of the control of railways. Here again the 46 separate authorities of the United States obtrude themselves at every turn; conflicting codes in regard to freight rates are matched against conflicting systems of taxation and conflicting methods of state control. And for what reason? On what basis? Why should a long and short haul clause be found in operation in one-half of the states and not in the other: why should 23 states[13] forbid the consolidation of parallel lines and 23 others permit it: how can it possibly be in the public interest that 16 states should enact laws in prohibition of pooling and that 29 should not: that one state should punish unjust discrimination with a fine of fifty dollars and another with a fine of twenty-five thousand; that the offense of obstructing the track should render the offender liable to three months in jail in Mississippi, three years in jail in New York and to capital punishment in Wyoming? But if one would be convinced of the sheer purposeless chaos into which the public management of transportation is reduced by the conflicting jurisdiction of the rival authorities of a federal sys-

[12] *Trade Unionism and Labor Problems* (1903). Introduction, p. xiii.

[13] Excluding Oklahoma. The statistics are taken from the publication of the Interstate Commerce Commission, *Railways in the United States in 1902*, Part iv.

tem it is only necessary to consult the comparative statement of the state regulation of railways published in 1903 by the Interstate Commerce Commission. The effect produced is as if a general statute regulating transportation had been snipped up with a pair of scissors into 45 parts and every portion and subdivision of it similarly divided, and the pieces then thrown broadcast over the surface of the country and afterwards swept up in each state and gummed together to make a railroad law. The opening words of the report in question are as follows: "One of the chief embarrassments in the exercise of adequate government control over the organization, the construction and the administration of railways in the United States is found in the many sources of statutory authority recognized by our form of government. The federal constitution provides for uniformity in statutory control, so far as interstate commerce is concerned, but it does not touch commerce within the states, nor, as at present interpreted, does it cover the organization of railroad corporations or the construction of railroad properties. These matters, as well as the larger part of that class of activities included under the police jurisdiction, are left to the states. Such being the case, the development of an harmonious and uniform railroad system must be attained if at all by one of two methods. The states must relinquish to the federal government their reserved rights over internal commerce, or having first agreed upon fundamental principles, they must, through comity and convention, work out an harmonious system of statutory regulation."

I have already referred above to the peculiar position occupied by the courts of law in the system thus created. It has been by the process of judicial interpretation and the gradual amplification of central power by indirect means that such relief as has been afforded to the confused economic situation has been rendered possible. The panegyrics that have been called forth by the timely exercise of this power of the court, have doubtless been engendered by a subconscious sense of public satisfaction at the avoidance of what would otherwise have been a national catastrophe. But the scientific student of the principles of government is at least entitled to ask whether the position in which the judiciary are thus placed, as one of the organic bodies of state control, is necessarily the best possible. Strangely enough this question never appears to be raised by American authorities. The interpretation of the law in such a way as to make new laws where none existed before, or to reverse or modify laws

already in existence, is assumed to be a natural and praiseworthy function of the judicial body. Thus there has sprung up an apotheosis in the courts of law in America which contrasts sharply with the general distrust of legislative bodies. The courts of final resort have become quasi-legislative bodies. Let me cite on or two very reputeable authorities on this point. "The nine justices of the Supreme Court," writes Mr. Beck, "are a quasi-constitutional convention. As the conditions which call for the exercise of constitutional powers change with the progress of the centuries necessarily the true powers of the constitution *often latent and unsuspected* must from time to time be disclosed and developed," "I may say at once," writes Professor Seager in discussing the attitude of American courts toward restrictive labor laws, "that the conclusion to which I have been brought is that under the flexible provisions of our constitutions the question of the constitutionality of a restrictive labor law is inseparably connected with the question of the wisdom of such a law. In other words, granted that a restriction is wise under the given conditions, *it is an easy task to prove that it is also constitutional.* If this view is correct no amendments to American constitution will be needed to provide the country with as comprehensive labor codes as are found abroad. *All that will be required is the conversion of American judges to belief in the beneficence of this species of legislation."* In the face of this statement one cannot help a feeling of amusement at the remark made by Professor Seager in immediate connection with the above, that "*Workingmen are not usually able to follow the subtle reasoning on which judicial decisions rest.*"[14]

Let me quote in the same connection another very eminent authority. "The public opinion of one age and generation, even the thoughtful and judicial opinion," says Mr. Frederick Judson, "is not that of another. It was the changed economic conditions, the tremendous development of commerce between the states, which forced the way to the judicial recognition of the latent federal powers in the commerce clause of the constitution." Or take the words of the same eminent commentator in regard to the Lottery Cases. "The change in public opinion influencing constitutional judicial construction may result not only from economic or social changes but from changes in the moral standards of public opinion. This was forcibly illustrated in the lottery cases where the decision was *based*

[14] H. R. Seager. *Political Science Quarterly*, Vol. 19, p. 589.

on a distinctly moral ground that lotteries were recognized public nuisances: while at the time of the adoption of the constitution lotteries were a recognized means of raising money for public, educational and charitable purposes. It would have appeared strange indeed to the framers of the constitution that the federal power could ever be successfully exerted to prohibit interstate traffic in lottery tickets." Surely this is equivalent in plain prose to stating that the constitution approved of state lotteries and the Supreme Court did not. Indeed such phrases as the "true powers of the Supreme Court," "latent and unsuspected," would seem a little absurd and almost ludicrous were it not for the extreme gravity of the subject. Who is it that does not suspect them? What first arouses public suspicion of their possible presence? What daring hand finally lifts the lid off them and reveals them to the public eye? or what is a *decision based on moral grounds?* Surely there is involved here a political occultism of a new sort. These acts are the acts of a legislature, not a court of law. Why should not theorists at any rate give things their proper names and say that in view of the faulty operation of federal government in the economic field the judiciary assume, as far as they dare venture, the functions of a legislature, and when the plain sense of the text of the constitution will not harmonize with their view of present needs they meet the situation by taking something out of the constitution which was never put into it? Yet somehow—apart from the whispered confabulations of the commentators among themselves—there is a hesitancy to use such brutal bluntness in regard to this Holy of Holies of the American Constitutional System. It may be that in this fact we catch sight of a general tendency as old as the history of human government. All governments since the beginning of the world have lived upon Mystery. The medicine man of Nigeria owes his power over his adherents to his notorious intimacy with the unseen spirits of the jungle. Monarchy lived long upon its shrouded and mystic connection with Divinity. American democracy, having by its degradation of the legislature repudiated its first born child, has set up for itself the Mystic Worship of Judicial Interpretation.

Consider finally the intricacy and complexity which often surrounds the smallest of legislative measures under a federal system. The legislature of California (I believe I am citing an actual case) passes a law forbidding a barber to shave on Sunday. At once arises the question, Have the legislators the necessary power? Can the barber shave

under the fourteenth amendment in spite of them—*à leur barbe,* as the French put it? Is shaving interstate commerce? Is it perhaps an unsuspected power of the constitution? Is shaving on Sunday a thing permissible in itself on moral grounds? And so the case originates and is bandied from court to court with much citation of many things which, save for the Great American Mystery, would seem to have nothing to do with it, until finally it is settled on plain principles of common sense just as it would have been settled in the first instance by the legislature of a unitary government.

The present essay has been concerned rather with a critical analysis of the present than with prophecy as to the future. But if the analysis thus made is just, it would appear that the forecasts of Professor Sidgwick and others on regard to the future of federal government are based upon an imperfect estimate of the force of economic factors in modifying the structure of government. It is the opinion of the present writer, hazarded with all deference to the weight of distinguished authority to the contrary, that in proportion as economic progress results in industrial integration, federal government is bound to give way. It is destined finally to be superseded by some form of really national and centralized government, occupying at its own discretion whatsoever part of the total economic and industrial field it may see fit to occupy untrammeled by the network of a written constitution and the jugglery of judicial interpretation.